



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Windsor Maintenance Company

**File:** B-235745

**Date:** October 4, 1989

---

### DIGEST

1. Protest that after cancellation of a sealed bid procurement, award following negotiations at a price higher than the lowest rejected bid is precluded by Federal Acquisition Regulation (FAR) § 15.103(c), is denied; prohibition applies only where cancellation is based on unreasonable prices or collusive bidding, not the case here.
2. Protest that General Services Administration (GSA) failed to comply with FAR provision requiring agency head to authorize cancellation of invitation for bids, is denied; GSA Acquisition Regulation delegates cancellation authority, and determination to cancel was signed by the proper official.
3. Protest that oral discussions were inadequate is dismissed where protester's best and final offer (BAFO) was rejected not for the alleged discussion deficiencies, but instead for a deficiency first introduced in the firm's BAFO.

---

### DECISION

Windsor Maintenance Company, a joint venture, protests the award of a contract to BFI Stephens, Inc., following negotiations after the cancellation of invitation for bids (IFB) No. GS-09P-89-KTC-0042/ICA11200, issued by the General Services Administration (GSA) for asbestos abatement at the Phillip Burton Federal Building, San Francisco, California. Windsor challenges the award on several grounds.

We deny the protest in part and dismiss it in part.

The contracting officer determined that Windsor's apparent low bid under the IFB was nonresponsive due to (1) the uncertain enforceability and firm commitment of the letter

of credit Windsor submitted as a bid guarantee, and (2) the lack of a bid signature by each participant in the joint venture. The contracting officer also determined BFI's second low bid to be nonresponsive on the basis that the bid was conditioned on terms to be agreed upon at a later date, and found the third low bid nonresponsive because each joint venture participant had failed to sign the bid and the bid took exception to some of the specifications. Having determined that all three bids received were nonresponsive, GSA canceled the IFB in May 1989 and completed the acquisition through negotiation. See Federal Acquisition Regulation (FAR) §§ 14.404-1(e)(1) and 15.103. In its best and final offer (BAFO), Windsor submitted payment and performance bonds as a substitute for the previously submitted letter of credit. While Windsor was again the apparent low offeror under the BAFOs received, the agency determined that the bonds were unacceptable because they were issued by a company not listed on Treasury Circular 570, as is required under FAR § 28.202-1(a)(1).<sup>1/</sup> The agency rejected Windsor's BAFO on this basis and on May 19 awarded a contract to BFI, the next low offeror.

Windsor first complains that the award to BFI was improper because it was at a price higher than the lowest bid received from a responsible bidder under the IFB, in violation of FAR § 15.103(c). We do not agree. Under FAR § 15.103, when an IFB has been properly canceled, the contracting officer may use negotiations to complete the procurement without issuing a new solicitation, subject to certain conditions, including the condition that "the negotiated price is lower than the lowest rejected bid price of a responsible bidder that submitted a bid in response to the invitation for bids." FAR § 15.103(c).

We previously have interpreted the term "lowest rejected bid price" in this provision as referring to a bid price rejected as unreasonable or as not independently reached in open competition. Free State Reporting Inc., et al., B-225531 et al., Jan. 13, 1987, 87-1 CPD ¶ 54, aff'd on reconsideration B-225531.3 et al., Mar. 6, 1987, 87-1 CPD ¶ 263. If the condition applied to bids rejected as nonresponsive, as here, it would have the unreasonable effect of precluding bidders that did not meet all material

---

<sup>1/</sup> We note that the protester does not challenge the agency's position in this regard and in fact its BAFO requested that GSA treat the submitted bonds as issued by a Treasury-listed acceptable surety, even though the surety was not so listed, but instead had only an application pending before the Treasury Department.

requirements, and that thereby may have been able to bid lower than they otherwise would, from offering a higher price for adhering to all such requirements in the negotiation phase. Id. Here, the bids were rejected, not because of unreasonable prices or price collusion, but as nonresponsive, for failure to meet the bid bond requirement or other material defects that could affect price. Consequently, the prohibition against awarding at a higher price following cancellation in FAR § 15.103(c) does not apply, and the agency was not precluded from making the award to BFI.2/

Windsor also complains that the agency improperly canceled the IFB in violation of FAR § 14.404-1(e)(1), which requires authorization of the cancellation by the agency head. We find no violation of the provision. The GSA Acquisition Regulation delegates cancellation authority to the head of the contracting activity, defined as the regional administrators; here, the determination to cancel was signed by the appropriate regional administrator for region 9. GSA Acquisition Regulation §§ 514.404-1 and 502.101.

Further, Windsor contends that GSA failed to inform the firm during discussions of the perceived deficiencies in its letter of credit (submitted as the firm's bid guarantee), and the joint venture's bid signature. The agency maintains it did discuss the perceived deficiencies in Windsor's bid during negotiations. It is not clear whether Windsor's bid deficiencies were discussed, although we view Windsor's substitution of performance and payment bonds for its defective letter of credit as support for GSA's position. In any event, since Windsor's BAFO was not found unacceptable for the reasons the firm is now challenging, but instead was found unacceptable for a deficiency first introduced in the firm's BAFO, the issue of whether discussions were held on the perceived deficiencies in Windsor's bid as originally submitted is irrelevant. That is, even if inadequate discussions were held on the letter

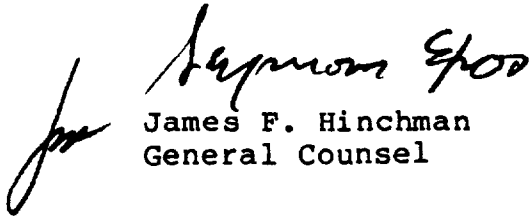
---

2/ Windsor also complains that GSA failed to properly notify the firm of its intent to complete the procurement through negotiation, another condition under FAR § 15.103. However, as Windsor acknowledges that it received amendment No. 2, which canceled the solicitation, notified prospective offerors of the agency's intent to complete the procurement by negotiation, and gave a closing date for receipt of offers, we find no basis to this aspect of Windsor's protest. While Windsor contends it never received a signed copy of the amendment, this is an inconsequential matter of form over substance which did not affect Windsor's notification of the agency's intent to negotiate.

of credit and the bid signature, since Windsor removed the letter of credit and apparently executed proper signatures in its BAFO, adequate discussions on the original bid deficiencies would not have affected the acceptability of the firm's BAFO.

Finally, Windsor complains for the first time in its comments on GSA's report on the protest that the agency failed to provide adequate time for proper negotiations and submission of a BAFO. Windsor's protest in this regard is untimely, and will not be considered, because it is based on an alleged solicitation proprietary that was apparent prior to the closing date for receipt of proposals, and was not filed by the amended closing date, May 12, 1989. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989).

The protest is denied in part and dismissed in part.

James F. Hinchman  
General Counsel